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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

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# No. 519

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STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

*Petitioner,*

*vs.*

JAMES D. COUGHRAN.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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## RESPONDENT'S SUPPLEMENTAL BRIEF AND AUTHORITIES.

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This memorandum is respectfully submitted in support of the judgment heretofore rendered, and to supply authorities not contained in respondent's brief in opposition to the petition for writ of certiorari, to which brief, however, reference is hereby made.

I.

### Petitioner May Not Litigate, in This Action, the Question of Who Drove the Car at the Time of the Accident.

The facts were known to petitioner at the time of the original trial in the *tort* action (R., Finding XI, pp. 14-15;

Finding XVI, p. 17; p. 43). At that time petitioner chose to rely upon the testimony of Helen B. Anthony which it believed to be false (R. 38, last paragraph; p. 39 (top)). The facts were first revealed to this respondent and his counsel after petitioner's defense based upon Helen B. Anthony's testimony had failed (R. 38).

*A. California Law.*

It is the law of California that a judgment against an assured is binding and *res judicata* as to the insurer, on every material fact concerning the nature of the casualty, if such fact could have been litigated in the original action.

*Lamb* v. *Belt Casualty Co.*, 3 Cal. App. (2nd) 624, 40 Pac. (2nd) 311;
*Parra v. Traeger*, 214 Cal. 535, p. 538;
*Civil Code of California*, Sec. 2778.

The case of *Lamb* v. *Belt Casualty Co., supra,* holds that the material allegations of the complaint concerning the nature of the loss or casualty, determine that question. This decision seems not to require that the issue be triable in the *tort* action for it is not easy to understand how the question of proximate cause as between the truck and the trailer could have been tried conveniently in the action against the assured. In the case at bar, however, it is not necessary to go so far.

The entire sequence of events surrounding Nancy Leidenacker was highly material and could and should have been litigated in the original *tort* action. The assured was sued on a theory of permissive use only. There was no allegation of agency. The evidence showed that the assured had forbidden Nancy Leidenacker to drive his car, and counsel for petitioner knew of this fact (R. 28, fol. 40; p. 41, fol. 60; p. 42, fol. 61). The trial judge in the case at bar found this evidence to be true and that Nancy Leidenacker had

no permission from the assured to drive the car (R. 42, fol. 61). It is the law of California that an automobile owner is not liable, in the absence of agency, when no permission actually exists,

*Bradford* v. *Sargent,* 135 Cal. App. 324, 27 P. (2nd) 93,

and that where permission exists the owner is liable only within the scope and terms thereof.

*di Rebaylio* v. *Herndon,* 6 Cal. App. (2nd) 567, 44 P. (2nd) 581.

Therefore, if the facts had been shown it would have appeared that Nancy Leidenacker had no permission, and that Helen B. Anthony had exceeded the terms of hers. By suppressing these facts petitioner exposed its assured to a liability which might not otherwise have been imposed upon him. What excuse is offered for the trial of the original action upon testimony petitioner secretly believed to be perjurious? It is that petitioner's counsel did not wish to impeach his own client (R. 38, fol. 56), and that the facts as now revealed would have impaired petitioner's prospects for a successful defense (R. 39, top). May it be remembered that Helen B. Anthony was not an assured, that petitioner owed her no contractual duty, and that by requesting a continuance and substituting other counsel its imagined embarrassment would have been removed. No motion for continuance was ever made (R. 38).

b. *Law of United States Courts.*

It has also been held by this Court that a judgment against an assured is binding upon one secondarily liable as to all facts material to the original action, where the latter had a chance to defend.

*Washington Gaslight Co.* v. *District of Columbia,* 161 U. S. 316, p. 329, *et seq.,* 40 L. Ed. 712.

It has also been so held by the Circuit Courts of Appeal.

*Int. Ind. Co.* v. *Steil,* 30 F. (2d) 654, p. 655;

*Royal Ins. Co.* v. *St. L. & S. F. Ry. Co.,* 291 Fed. 358.

It is conceded in the dissenting opinion in the case at bar that this is so (R. 67), but the learned judge places an unwarranted limitation upon the rule, intimating that it fixes the amount of the judgment, and the liability of the assured alone. There is no authority for this limitation. The case cited (*Lamb* v. *Belt Casualty Co., supra*) *holds that it fixes* the assured's liability *and* that it fixes it as alleged in the complaint.

II.

**The Policy May be Reasonably Construed so as to Preserve the Insurance.**

Wherever possible and reasonable, a construction preserving insurance coverage should be adopted in preference to one defeating it.

*Liverpool & London & Globe Ins. Co.* v. *Kearney,* 180 U. S. 132, at p. 136;

*Thames Mersey Marine Ins. Co.* v. *Pacific Creosoting Co.,* 223 Fed. 561, p. 567;

*Pacific, etc., Co.* v. *Williamsburgh, etc., Co.,* 158 Cal. 367.

The construction respondent prays for preserves to petitioner its true intention. It is this: Petitioner intended to distinguish between adult and presumably responsible persons on the one hand and immature and infirm persons on the other. The exclusion clause was not written in contemplation of these peculiar facts. Before the policy was issued the identical clause had been judicially interpreted (*O'Connell* v. *N. J. Fed. Ins. Co.,* 201 App. Div. 117, 138

N. E. 744, 235 N. Y. 583; *Williams* v. *Nelson,* 228 Mass. 191, 117 N. E. 189), and petitioner certainly had notice that the clause *might* be interpreted again as now prayed by respondent. Yet it made no change in the phraseology of the policy, although it determined the wording thereof. Furthermore, all petitioner had in mind was to exempt itself from liability created by those who are too young or too inexperienced to be licensed. It has been found by the trial court, upon ample evidence, that the accident in question was caused by Helen B. Anthony, an adult person. *The accident was caused by a member of a class to whom petitioner intended to extend coverage and not by one intended to be excluded* (R., Finding III, p. 12; Finding XVII, p. 17). Mrs. Anthony caused assured's car to be placed in the perilous position in the first place by urging Nancy Leidenacker to pass the truck (R. 29, mid. page), and Mrs. Anthony herself seized the steering wheel and gave the car the direction which alone caused the injury to respondent (R. 33, top; p. 34, top; p. 23, top).

It thus conclusively appears that the accident was caused by a member of that class of persons to whom petitioner was willing and intended to extend coverage. The conduct of Nancy Leidenacker was not the proximate cause of the accident under the findings of the trial court.

In conclusion it is respectfully pointed out that petitioner's defense that both Helen B. Anthony and Nancy Leidenacker drove the car in violation of law as to age, is not pleaded. The sole plea is that the car was driven by a person in violation of law as to age and that the driver was Nancy Leidenacker (R. 6-7, I). In any event it was not the act of Helen B. Anthony *in giving permission* to Nancy Leidenacker to drive which caused the accident, for Nancy Leidenacker did not cause the accident, as the

trial court herein found. The accident was caused by the individual and insured conduct of Helen B. Anthony in directing the passing to be commenced and in personally seizing the wheel thereafter and steering the car so as to cause the accident in question.

It is most earnestly and respectfully submitted that this construction of the policy is reasonable, and if so, it should be adopted as it preserves the insurance coverage. A reversal of this judgment will expose the assured to a liability he might not have had if petitioner had presented the facts when it defended him. It is reasonable because it preserves to petitioner its true intention: to assume responsibility for adult behavior, but not for the immature and infirm. *This casualty was proximately caused by adult behavior,* as the record shows, and petitioner is bound by the record. If petitioner, in issuing the policy, considered the possibility of such a contingency as this, it was apparently satisfied with the prior adjudication, which, regardless of any and all distinguishing features, assuredly gave it notice of the judicial trend. No authority in point is cited by petitioner and the New York and Massachusetts decisions cited by respondent are strong precedent in his favor. (The judgment of the Appellate Division of the Supreme Court of New York on undistinguishable facts in *O'Connell* v. *N. J. Fed. Ins. Co., supra,* was affirmed by the Court of Appeals, 235 N. Y. 583.) In addition, under the law of California, since the evidence now adduced was highly material and properly triable in the *tort* action, petitioner is now estopped from trying it at all. The decision of this Court in *Washington Gaslight Co.* v. *District of Columbia, supra,* and of the Circuit Courts of Appeals in *International Indemnity Co.* v. *Steel, supra,* and *Royal Ins. Co.* v. *St. L.-S. F. Ry. Co., supra,* support the California rule.

It is respectfully prayed that the judgment of the District Court and of the Circuit Court of Appeals be affirmed.

Respectfully submitted,

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# SUPREME COURT OF THE UNITED STATES.

No. 519.—October Term, 1937.

State Farm Mutual Automobile Insurance Company, Petitioner, vs. James D. Coughran. } Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[March 28, 1938.]

Mr. Justice McReynolds delivered the opinion of the Court.

Petitioner's policy insured one R. O. Anthony, the owner, against liability for injuries caused by a designated automobile. As the result of alleged negligent and unlawful action by the assured's wife the car collided with a truck June 16, 1934. Respondent Coughran suffered injuries for which he recovered judgment against Anthony, also against his wife. Both were insolvent; a writ of execution against them was returned unsatisfied.

Thereupon respondent commenced this suit to recover of petitioner the amount of his unpaid judgment. He claimed this right under the policy and statute. Answering, the company exhibited the policy and denied liability. As a first separate defense it alleged that Anthony and his wife had not complied with certain terms of the contract. As a second—

"That said accident was an accident for which the defendant under the terms and conditions of said policy is not liable in that: At the time and place of the accident the automobile of the insured was being driven and operated by a person who was not the paid driver of the insured, nor a member of his immediate family, nor a person acting under the direction of the assured. This defendant alleges that the said automobile at the time of the accident was being driven and operated by a person in violation of the laws of the State of California as to age and as to driver's license and further alleges that the driver of said car was a minor, being a female of the age of approximately 13 years."

There were other separate defenses.

A jury having been waived, the cause went to the court on the pleadings and evidence. It made findings of fact with conclusion

of law and entered judgment for Coughran. Neither side requested other or different findings.

The Circuit Court of Appeals thought findings III and XII were inconsistent "and to elucidate the truth a review of the testimony is required." After such review it ruled that the findings so elucidated were adequate and required affirmation of the challenged judgment. One judge thought otherwise and presented a separate opinion.

Under applicable statutes and repeated rulings here, the matter open for consideration upon the appeal was whether the findings of the trial court supported its judgment. To review the evidence was beyond the competency of the court. U. S. C. A. Title 28, §§ 773, 875; *Walnut* v. *Wade*, 103 U. S. 683, 688; *Stanley* v. *Board of Supervisors*, 121 U. S. 535, 547; *Law* v. *United States*, 268 U. S. 494, 496.

Two persons were in the insured automobile when the accident occurred. Nancy Leidendeker, a girl of 13 without license to drive, occupied the driver's seat. By her side sat Helen B. Anthony, wife of the assured, an adult holding a driver's license.

The principal point upon which the petitioner now relies is that as the accident occurred when the car was being driven and operated by the young girl contrary to the owner's commands and in violation of California statutes, the policy did not cover his liability.

The policy (incorporated in the findings) under the heading "Terms and Conditions Forming a Part of This Policy", provides—

"(1) *Risks Not Assumed by This Company.* The Company shall not be liable and no liability or obligation of any kind shall attach to the Company for loss or damage: . . . (A) . . . (D) Unless the said automobile is being operated by the Assured, his paid driver, members of his immediate family, or persons acting under the direction of the Assured; (E) Caused while the said automobile is being driven or operated by any person whatsoever either under the influence of liquor or drugs or violating any law or ordinance as to age or driving license; (F) . . . ."

Applicable sections of the California Vehicle Act,—Stats. 1923, pp. 518, 519, 536; Stats. 1927, p. 1427; Stats. 1931, p. 2108—follow:

"Section 1. The following words and phrases used in this act shall have the meanings here ascribed to them."

. . . . . .

"Sec. 18. "*Operator*". Every person who drives, operates or is in actual physical control of a motor vehicle upon a public highway."

"Sec. 76. *Unlawful to employ unlicensed chauffeur.* No person shall employ for hire as a chauffeur of a motor vehicle, any person not licensed as in this act provided. No person shall authorize or knowingly permit a motor vehicle owned by him or under his control, to be driven by any person who has no legal right to do so or in violation of the provisions of this act."

"Sec. 58. *Operators and chauffeurs must be licensed.*

"(a) It shall be unlawful for any person to drive a motor vehicle upon any public highway in this state, whether as an operator or a chauffeur, unless such person has been licensed as an operator or chauffeur; except such persons as are expressly exempted under this act." [Exceptior not applicable here.]

"Sec. 64. *What persons shall not be licensed as operators or chauffeurs.*

"(a) An operator's license shall not be issued to any person under the age of sixteen years and no chauffeur's license shall be issued to any person under the age of eighteen years, provided that an operator's license may be issued to any minor over the age of fourteen years and less than sixteen years of age upon special application and statement of reasons by the parent or guardian of such minor."

Especially pertinent findings by the trial court follow:

"III. The court finds that on or about the 16th day of June, 1934, and while said policy was in full force and effect, one Helen B. Anthony operated the Chevrolet automobile referred to in and covered by the said policy of insurance with the permission and consent of the assured, R. O. Anthony, and operated the same negligently so as proximately to cause an accident and injury to the person and property of the plaintiff to his damage in the reasonable sum of Five Thousand Ninety-two and 55/100 Dollars ($5092.55)."

"IX. The court finds that it is true that the defendant, prior to the trial of the action in the state court entered into the non-waiver agreement received in evdience in this action with the assured, R. O. Anthony, and with Helen B. Anthony. That the said non-waiver agreement was executed just prior to the commencement of the trial of the state court action. That the plaintiff was not a party to that agreement and had no knowledge of any facts referred to therein and was not in privity with any of the defendants in the state court action and that so far as the conduct of the defendant affects the plaintiff in this action, the defendant managed and conducted the defense in the state court."

"XII. With regard to the second separate defense of defendant, the court finds that the said automobile at the time of the impact

that resulted in the injury to the plaintiff was being jointly operated by Helen B. Anthony and Nancy Leidendeker; that said Helen B. Anthony was a member of the assured's immediate family and was an adult person over the age of twenty-one (21) years who was licensed by the State of California to drive an automobile; and that said Nancy Leidendeker was a minor and not permitted under the applicable laws to operate a motor vehicle in the State of California; that the assured had forbidden said minor Nancy Leidendeker to drive any motor vehicle or automobile of which he was the owner or which he controlled; and that the action of said Nancy Leidendeker on the day of the accident and at the time of the impact involved in this action were in disobedience of and contrary to the commands, orders and instructions of the assured, R. O. Anthony; that at the time of the accident, insofar as the propulsion of the vehicle was concerned, other than the means of direction, all instrumentalities of said automobile were being physically actuated by said minor Nancy Leidendeker, with the acquiescence and knowledge of Helen B. Anthony and without any knowledge, acquiescence or consent on the part of the assured, R. O. Anthony; that the proximate and direct cause of the collision between the insured automobile and a truck owned by San Pedro Commercial Company was the act of Helen B. Anthony in seizing the steering wheel of the automobile at and immediately preceding the moment of impact and collision."

"XVI. That prior to the commencement of the trial of the said State court action the defendant had full knowledge of all the facts and circumstances concerning the presence of the said Nancy Leidendeker in the driver's seat or in a part of said seat, and all other facts relied on by the defendant as constituting a concealment and a defense of the case at bar, but that the defendant did not reveal said facts to the plaintiff or his counsel, and that plaintiff and his counsel had no knowledge that the said Nancy Leidendeker occupied any part of the driver's seat until said trial was completed."

"XVII. The court finds that prior to the collision between the insured automobile and a truck owned by the San Pedro Commercial Company, Helen B. Anthony seized the steering wheel of the insured automobile and steered the same to the right, proximately causing the same to come into collision with the said truck and proximately causing the same to turn to its right, proximately causing the collision of plaintiff's car and the injuries and damages suffered by him."

When read together no material conflict exists between findings III and XII; there is no real difficulty in understanding the circumstances to which they are addressed. The first contains statements concerning the conduct of one in authority; the second de-

scribes in detail what really took place at the moment of collision. The word "operate" has varying meanings according to the context. Webster's New International Dictionary. One may operate singly with his own hands, or jointly with another, or through one or more agents.

From the findings it appears that when the accident occurred the automobile was not being operated by the assured, his paid driver, a member of his immediate family or a person acting under his direction, within fair intendment of the policy. Contrary to the owner's commands "insofar as the propulsion of the vehicle was concerned, other than the means of direction, all instrumentalities of said automobile were being physically actuated by said minor" who was inhibited by the statutes from driving or operating a motor vehicle within the State.

Just before the accident, Mrs. Anthony seized the steering wheel and by negligent manipulation of this caused the collision.

If, as found, the automobile was being jointly operated by the wife and the girl the risk was not within the policy. The latter was forbidden by law to operate or drive jointly or singly. If the wife was in control the statute forbade her to permit driving by the girl. In any view, when the collision occurred the car was being driven or operated in violation of the statutes.

In support of his position respondent relies heavily upon *O'Connell* v. *N. J. Fed. Ins. Co.*, 201 App. Div. (N. Y.) 117; and *Williams* v. *Nelson*, 228 Mass. 191. These causes, we think, are not in point. They were decided upon facts and circumstances materially different from those here disclosed.

Respondent further submits that petitioner is precluded from any inquiry concerning who actually was driving the car when the accident occurred. He says the entire sequence of events surrounding Nancy Leidendeker was highly material and should have been litigated in the original tort action brought by Coughran against the Anthonys, and based solely upon permissive use. Also, if the facts then known by petitioner had been there revealed, it would have become apparent that the girl lacked permission to drive and that the wife exceeded the terms of her authorization; and that by suppressing these facts petitioner exposed the assured to a liability which otherwise might not have been imposed.

The judgment roll of the tort action is not before us; we are limited to the findings. That action was defended by the peti-

tioner under a non-waiver agreement; the complaint alleged damages from negligence of the wife as driver and operator imputed to the husband. Defenses now presented by the Insurance Company against liability under the policy were not involved. Joint driving by Mrs. Anthony and the girl was not subject to inquiry.

Moreover, in the circumstances we may not conclude that respondent should prevail because petitioner failed to present facts in the tort action which he says if then presented might have defeated the very judgment upon which he now relies to support his claim.

The judgment of the Circuit Court of Appeals must be reversed. The cause will be remanded to the District Court with instructions to enter judgment for the Insurance Company, petitioner here.

*Reversed and Remanded.*

Mr. Justice CARDOZO took no part in the consideration or decision of this case.

A true copy.

Test:

*Clerk, Supreme Court, U. S.*